No. 20908

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERLE G. SWANSON and HELEN F. SWANSON, husband and wife, Appellants, v. COMMERCIAL ACCEPTANCE CORPORATION, a Missouri corporation, Appellee.	)

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

THE HONORABLE WILLIAM G. EAST, Judge

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TABLE OF AUTHORITIES

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GENERAL STATEMENT

Appellee cites 55 cases. Most of them merely support ropositions which we conceded in our opening brief and as to hich there is no dispute. We will, therefore, do as we did n our opening brief--confine ourselves to cases which are

THE TRIAL COURT'S FINDINGS

We have no quarrel with the general proposition stated by appellee in this regard. Of course, the trial court's findings of fact will not be disturbed, and we agree with appellee's authorities. Appellee correctly states on page 7 of its brief, that "the scope of review is limited to the application of the law." With this we also agree. There is no contention on our part that the findings of fact are in error. All that is involved in this case is the application of the law to the facts as found by the court.

In its findings (R.87), the lower court found that prior to the time that the notes and mortgages were executed, the seller, Fuline, delivered to appellee the appellants' application for a franchise containing their financial statement and credit information, a verification of bank balance, and an executed copy of Fuline's form of request for financing [Ex. 10 (A)(B)(C)] which request was approved prior to the execution of the first note and mortgage.

The lower court also found that in the second transaction giving rise to the second note and mortgage, the matter was submitted orally to the appellee, and approved by it prior to the time that the second note and mortgage were drawn and executed by appellants (R.88). The other crucial findings of fact are contained in the other findings of the court including a history of past dealings, use of the finance company's forms, etc.

In the court's decision, it is made clear that the conclusion that the finance company did not "participate in the transaction" is one of law. This is made clear on page 12 of the decision (R.95) because this statement is included under the heading related to the applicable statutory text and case law as applied to the previously found facts. This case was decided on the basis of what, as a matter of law, constitutes "participation in the transaction."

We take exception to the appellee's statement that appellee had no contractual duty to purchase the paper in question and that we have ignored the findings and conclusions of fact of the trial court (see appellee's brief, page 8).

While it is true that Fuline was not legally bound to sell the paper to the appellee, the appellee was legally bound to purchase the paper when presented to it. As we set forth above, the court clearly found that the applications were made to the appellee to finance the two transactions. After their approval by appellee, the exact terms were later incorporated in the notes and mortgages. The first application was made in writing (Ex. 10-C) and the second application was made orally. Thus, the appellee <u>did</u> have the contractual duty to purchase the paper when, as and if submitted to it. That these are the lower court's findings is made clear in the portion of the opinion relating to legal conclusions where the court states that the "sole participation in the transaction" on the part of appellee was "to give a <u>commitment</u> that it would, if offered, purchase the notes and their respective securities* * * *" (R.95).

This commitment was also, as clearly found by the court, accompanied by the investigation and approval of appellants' credit, the use of the printed forms on which the note and mortgage were printed on a single sheet of paper with the note undetached, and a history of past dealings. In addition, on page 14 of his decision (R.97) the court makes it clear that his legal conclusion is that even though there was "furnishing of forms of notes and mortgages (being attached on the same sheet of paper), reviewal of the maker's financial statement, dealings of prior transactions, and prior commitment to purchase or discount" this does not, as a matter of law, constitute active participation or make the finance company a party to the transaction. It is this conclusion of law that we dispute.

APPELLEE'S AUTHORITIES

Turning to the cases cited by the appellee, do they support the court's legal conclusion and would they be followed by the Oregon Supreme Court if it were deciding this case?

On page 11 of its brief, appellee cites a number of cases holding that the fact that the note and chattel mortgage are executed concurrently or on the same piece of paper has been repeatedly held not to defeat the status of holder in due course. With this we agree. We so conceded in our opening brief. The same thing is true of the other statements for which authority is cited that the furnishing of forms does not prevent holder in due course status nor does the fact that the

In the case at bar, all of the foregoing factors are present, and in addition, there was the investigation of the credit of the appellants plus the commitment of the finance company prior to making of the sale that it would finance the transaction based on the amount and exact terms later incorporated in the notes and chattel mortgages which were purchased by it pursuant to its prior commitment.

On page 11 and 12 of its brief, appellee cites the following cases for the proposition that investigation of credit will not prevent holder in due course status:

(a) Commercial Credit Corporation v. Smith, 143 Misc. 478, 256 N.Y.S. 759 (1932). This City Court of Buffalo, New York decision clearly shows that the investigation was made after the note was signed. This is a far cry from the case at bar. Obviously, the finance company did not participate nor was it a party to the transaction where the note had already been executed prior to the submission of the same to it for its investigation of credit.

(b) Intges v. People's Finance & Trust Co., 44 S.W. 2d 1028 (1931). In this Texas Court of Appeals case, no finance company was involved. This was an ordinary note; there was no element of the use of printed forms, prior dealings, etc.

(c) White System of New Orleans, Inc. v. Barganier, 172 So. 2d 741 (1965). Examination of this Louisiana, Fourth Circuit, Court of Appeals case

shows that there is no evidence or indication that the investigation of credit was made prior to the time that the note was written.

Turning to the appellee's statement that it is immaterial that prior to the making of the sale, there was a commitment to finance the transaction, the authorities cited are as follows, (appellee's brief, page 13):

(a) White System of New Orleans, Inc. v. Hall, 219 La. 440, 53 So. 2d 227 (1951). This, and a subsequent Louisiana case, infra, are the only modern cases from a court of last resort that we could find where every factor present in the case at bar was involved and the court held that the finance company was a holder in due course. The court recognizes and refuses to follow the then decided cases cited by us in our opening brief.

(b) Morgan v. Mulcahey, 298 S.W. 242 (1927). This case, decided by the Kansas City Court of Appeals (Mo.) involved a commitment on the part of an endorsee to a seller, prior to the sale of a car, that the ensuing note would be purchased. There is no indication that there was the use of attached printed forms, past dealings, etc.

(c) National Bond & Investment Co. v. Miller, 76 S.W. 2d 703 (1934). This is also a Kansas City Court of Appeals case and it would appear to be directly in point in that the finance company's forms were

used and it had agreed to take the paper before it was written.

(d) James Talcott, Inc. v. Shulman, 82 N.J. Super. 438, 198 A.2d 98 (1964). In this Appellate Division of the Superior Court of New Jersey case, it appeared that there was a discounting arrangement between the seller and the finance company, and that the finance company's printed forms were used. However, there is no indication in the case that the finance company had given its prior commitment to purchase the particular paper involved.

(e) New Jersey Mortgage and Investment Corp. v. Calvetti, 68 N.J. Super. 18, 171 A.2d 321, (1961). All that can be said for this case is that the Superior Court of New Jersey, Appellate Division, stated that it was immaterial as to when the finance company was approached. As we have shown, except for the Louisiana Supreme Court, courts of last resort have regarded this factor as being highly material and decisive in that, as a participant or party to the transaction, the finance company is not entitled to holder in due course status.

(f) Universal C.I.T. Credit Corporation v. Alker, 239 La. 1057, 121 So. 2d 78 (1960). This is the second Louisiana Supreme Court case which involves the factual situation in the case at bar. It also recognizes the line of authorities upon which we rely and refuses to follow them.

(g) Singer v. National Bond & Investment Co., 218 Ala. 375, 118 So. 561, (1928). In this case decided by the Alabama Supreme Court in 1928, the facts show that there was a previous arrangement between the finance company and the payee of the note that the finance company would purchase it when it was executed. In its opinion, the Alabama Supreme Court stated,"We are cited to no authorities to the effect that this alone has a tendency to deprive plaintiff of its rights as a bona fide purchaser for value of negotiable paper." At the time this opinion was written, we agree that there was no authority. Now there is the substantial and well-reasoned authority upon which we rely.

CONCLUSION

In its brief, the appellee keeps repeatedly arguing that what we are really saying is that there was a lack of "good faith" on the part of the appellee. We stated in our opening brief, and we repeat, we are making no such contention. We are not claiming that there was any "bad faith" on the part of the finance company nor are we contending that it participated in the transaction in the sense that it dealt with the Swansons directly, or that it warranted the machines in question, or that Fuline was its agent. Under the authorities that we cite and urge this court to follow, there is no such requirement.

In the cases we cite and rely upon, there was a three-party transaction. The seller performs the function of selling the goods to the buyer and the finance company finances the sale. All three parties are participants. The seller and the buyer make a tentative arrangement to conclude the transaction, including the submission to the finance company. It is only when the finance company agrees to play its part that the transaction is completed through the cooperation of all three parties (see Ex. 2, letter of May 1, 1962, Fuline to Appellants, "We are happy to advise you that your credit has been approved by the finance company* * * *").

The notes in question were not, at least as far as the immediate parties to the transaction are concerned, launched into the channels of commerce so that they would pass from hand to hand unencumbered by defenses. The notes in question were drawn to meet the requirements of the particular commitment issued by appellee which would make it possible for the sale to be concluded. Therefore, to say as appellee does, that the "original transaction" was the sale of the equipment, and that appellee did not have a direct participation in this transaction is obviously in error. There would have been no such transaction unless all three parties had participated. The status of a holder in due course should not and is not afforded to a party to the transaction. As the court said in Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W. 2d 260, 261, "Rather than being a purchaser of the instrument after its execution it [the finance company] was to all intents and

purposes a party to the agreement and instrument from the beginning* * * *".

Respectfully submitted,

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